IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.69/2005

State
Through Public Prosecutor
High Court of Bombay at Goa. ..... Appellant.

V/s.

1. Agnelo Ferrao,
son of Jose Ferrao,
H.No.64, Patepur, Nuvem.

2. Mrs. Ana Rita Ferrao,
w/o. Agnelo Ferrao,
r/o. H.No.64, Patepur, Nuvem.

3. Polly Ferrao,
s/o. Anton Santan Ferrao,
r/o. H.No.65, Patepur, Nuvem.

4. Baseer alias Sameer Bepari,
s/o. Peter Mohammad Bepari,
r/o. Igorjebhat, Near Church,
Nuvem. ..... Respondents.

Ms. W. Coutinho, Public Prosecutor for the appellant-State.

Mr. Arun Bras de Sa, Advocate for the respondents.

CORAM : V.C. DAGA &
N.A. BRITTO, JJ.

DATE : 21ST JULY, 2006.

ORAL JUDGMENT : (Per BRITTO, J.)

Heard Ms. W. Coutinho, learned Public Prosecutor on behalf of the appellant-State and Mr. Arun Bras de Sa, learned Advocate on behalf of the respondents-accused.

2. This is an appeal against the acquittal of accused Nos. 2 to 4 under Section 302, 307, read with 34 IPC and against scaling down of conviction of accused No.1 from Sections 302, 307 read with 34 to Section 304(II) IPC and 324 IPC respectively.

3. The case of the prosecution against the accused was that on or about 23.10.1999 at about 17.15 hours at Patepur, Nuvem, accused No.1 Agnelo Ferrao stabbed the deceased Francis Colaco on his chest with kitchen knife, while accused No.2 Ana Rita Ferrao, accused No.3 Polly Ferrao and accused No.4 Baseer Bepari helped the accused No.1 in catching the deceased Francis Colaco, as a result of which, the deceased Francis Colaco succumbed to the injuries.

4. In the trial which followed, the prosecution examined 14 witnesses and the learned Sessions Judge, South Goa, Margao, by his Judgment dated 28th October, 2004, came to the conclusion that the incident had taken place on the spur of moment and only one knife blow was inflicted on the deceased Francis Colaco and, on the

basis of the same, concluded that it could not be said that accused No.1 Agnelo Ferrao had the intention to cause death of the said Francis Colaco, but, it could be said that accused No.1 had knowledge that the said Francis Colaco would die as a result of the injury sustained by him and considering the same, the learned Sessions Judge, scaled down the conviction of the accused from Section 302 to Section 304(II) IPC., as far as death of the deceased Francis Colaco was concerned. As far as the charge under Section 307 IPC. was concerned, the learned Sessions Judge observed that the injury sustained by PW.4 Jose Mascarenhas was on the backside of his left shoulder and, admittedly, the said injury was not on the vital part of said PW4 Jose Mascarenhas and there was nothing on record to show that PW.4 Jose Mascarenhas was even admitted as an indoor patient for treatment of the said injury. The learned Sessions Judge referred to the definition of Section 307 IPC which provides that whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder. The learned Judge observed and, in our view rightly, that in order to bring home the guilt of the accused under the purview of Section 307 IPC., it was required to be shown that the accused acted with such intention or knowledge and under such circumstances, that, if by that act he has caused death, he would be guilty of murder. The learned

Judge, therefore, concluded that there was nothing on record to show that accused No.1 had the intention or knowledge to commit the murder of PW.4 Jose Mascarenhas and, therefore, the offence under Section 307 IPC was not spelt out and proceeded to convict accused No.1 Agnelo Ferrao under Section 324 IPC.

5. As far as conviction of accused No.1 Agnelo Ferrao under Sections 304(II) and 324 IPC. is concerned, the learned Sessions Judge sentenced him to undergo Rigorous Imprisonment for a period of seven years and to pay a fine of Rs.5,000/-, in default, Rigorous Imprisonment for one year under Section 304(II) IPC. As far as Section 324 IPC is concerned, the learned Sessions Judge sentenced accused No.1 to pay a fine of Rs.500/-, in default, to suffer R.I. of 15 days. We are informed by the learned Public Prosecutor as well as by the learned Counsel on behalf of the accused that accused No.1 has undergone the sentence imposed upon him and has now been released from jail.

6. Admittedly, the incident took place at petrol joint where the family of accused No.1 Agnelo Ferrao and accused No.2 Ana Rita were selling petrol. The first three persons who arrived there on a Chetak scooter driven by PW.1 Nicolau Mascarenhas were the said Nicolau Mascarenhas PW.1, PW.11 Aires Mascarenhas and Francis

Colaco/deceased. As stated by PW.1 Nicolau Mascarenhas, PW.1 Nicolau Mascarenhas told accused No.4 Sameer Bepari to fill petrol in his Chetak scooter and accused No.4 Sameer Bepari initially filled in two litres of petrol and thereafter, the deceased Francis Colaco told accused No.4 Sameer Bepari to fill the tank which the latter did. However, neither PW.1 Nicolau Mascarenhas, nor PW.11 Aires Mascarenhas nor the deceased paid the money due on account of filling of the petrol, but told accused No.4 that another motor cycle would be coming and they all left in search of the said another motor cycle. Thereafter, all of them returned along with PW.7 Bernard Mascarenhas, PW.12 Paulo Mascarenhas and PW.4 Jose Mascarenhas on Suzuki motor cycle. The petrol joint run by accused No.1 Agnelo Ferrao and accused No.2 Ana Rita Ferrao is situated at a distance of about 25 metres from their house. PW.7 Bernard Mascarenhas was refused by accused No.2 Ana Rita Mascarenhas to give more petrol, presumably because the bill of the filing of the petrol tank of Chetak was not paid. The deceased Francisco Colaco took out Rs.100/- and gave it to accused No.4 Sameer who went to bring petrol. At this time, it is alleged that accused No.1 Agnelo Ferrao came running and asked Francisco whether he was moving with thieves. Then, PW.4 Jose Mascarenhas got down and touched and pushed accused No.1 Agnelo Ferrao questioning him in turn as to whom he was referring as thieves. Accused No.1 Agnelo Ferrao in

turn pushed PW.4 Jose Mascarenhas, and, accused No.3 Polly Ferrao and accused No.4 Sameer Bepari. At this time, accused No.2 Ana Rita Ferrao, accused No.3 Polly Ferrao, and accused No.4 Sameer Bepari are stated to have caught hold of the hands of PW.4 Jose Mascarenhas, at which time accused No.1 Agnelo Ferrao stated to have removed the knife from the right back side of waist portion and stabbed PW.4 Jose Mascarenhas on the backside and later on accused No.1 Agnelo Ferrao stabbed deceased Francisco Colaco on the right side of the chest. Admittedly, and as is rightly concluded by the learned Sessions Judge, the incident took place on the spur of moment, to which, to certain extent provocation was given by PW.4 Jose Mascarenhas and being so, the scaling down of the conviction from Section 302 to Section 304(II) read with 34 IPC and from Section 307 to Section 324 IPC., could not be faulted. The view held by the learned Sessions Judge is plausible view and considering that accused No.1 Agnelo Ferrao has also undergone the sentence, we are inclined not to interfere with the same.

7. As far as acquittal of accused Nos. 2 to 4 is concerned, although PW.1 Nicolau Mascarenhas had stated in his evidence that accused No.2 Ana Rita Ferrao had caught hold of Francisco Colaco from the backside and accused No.3 Polly Ferrao and accused No.4 Baseer had caught hands of Francisco Colaco, he was

confronted with his complaint where he had not made such a statement. In other words, the implication of accused No. 2 Ana Rita Ferrao, accused No.3 Polly Ferrao and accused No.4 Baseer as far as the complainant is concerned, was a clear improvement in this case. The learned Sessions Judge has referred to the evidence of PW.4 Jose Mascarenhas on this aspect of the case. According to PW.4 Jose Mascarenhas, he himself did not know whether accused No.1 Agnelo Ferrao was having a knife. According to him, accused No.2 Ana Rita Ferrao, accused No.3 Polly Ferrao and accused No.4 Baseer did not know that accused No.1 Agnelo Ferrao was having a knife. PW.4 Jose Mascarenhas further stated that the other persons who were along with him namely PW.1 Nicolau Mascarenhas, the deceased Francis Colaco, PW.12 Paulo Mascarenhas, PW.11 Aires Mascarenhas and Fernandes (who is not examined) were also not knowing that accused No.1 Agnelo Ferrao was having a knife. According to him, apprehending that PW.4 Jose Mascarenhas would assault accused No.1 Agnelo Ferrao, that accused No.3 Polly Ferrao and accused No.4 Baseer caught hold of him. He has not made reference to the role of accused No.2 Ana Rita Ferrao. The evidence of PW.4 Jose Mascarenhas which has been rightly considered by the learned Sessions Judge clearly shows that if at all accused No.2 Ana Rita Ferrao or for that matter accused No.3 Polly Ferrao and accused No.4 Baseer caught hold hands of PW. 4 Jose Mascarenhas, it was

to prevent him from assaulting accused No.1 Agnelo Ferrao, but certainly not to facilitate the assault by accused No.1 Agnelo Ferrao on PW.4 Jose Mascarenhas. In this view of the matter, the acquittal of accused No. 2 Ana Rita Ferrao, accused No.3 Polly Ferrao and accused No.4 Baseer Bepari, in our view, could not be faulted.

8. Considering the above, we find no merit in this appeal. Consequently, the same is, hereby, dismissed.

V.C. DAGA, J.

N.A. BRITTO, J.

ssm.